IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
November 14, 2007 Session

STATE OF TENNESSEE v. GARY KOUNS et. al.

Appeal from the Circuit Court for Marion County
No. 7736, 7746 A-B, 7739, 7774, 7745 A-B-C, 7751 Thomas W. Graham, Judge

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No. M2006-02788-CCA-R3-CD - Filed November 5, 2008

The Marion County Grand Jury indicted twenty-nine individuals under Tennessee Code Annotated section 39-17-433(a)(1) for the promotion of methamphetamine manufacture for purchasing an immediate methamphetamine precursor. The defendants filed motions to dismiss the indictments based upon constitutional grounds. After an evidentiary hearing, the trial court held that the constitutional issues were not valid but also found that Tennessee Code Annotated section 39-17-433(a)(1) did not apply to the purchase of immediate methamphetamine precursors because of the existence of Tennessee Code Annotated section 39-17-433(a)(2) which specifically refers to immediate methamphetamine precursors. The trial court went on to hold that the State could not prove one element of Tennessee Code Annotated section 39-17-433(a)(2). For these reasons, the trial court dismissed the indictments and refused any requests to amend the indictments. We have determined that the trial court was correct in its assessment that there were no valid constitutional issues with regard to the cases sub judice. However, we reverse the trial court's determination that Tennessee Code Annotated section 39-17-433(a)(1) cannot apply to immediate methamphetamine precursors. Therefore, we order the reinstatement of the indictments.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Trial Court is Affirmed in Part; Reversed in Part; and Remanded.

JERRY L. SMITH, J., delivered the opinion of the court, in which DAVID H. WELLES and JOHN EVERETT WILLIAMS, JJ., joined.

Robert E. Cooper, Jr., Attorney General & Reporter; Preston Shipp, Assistant Attorney General, and J. Michael Taylor, District Attorney General, and Dave McGovern, Assistant District Attorney General, for the appellant, State of Tennessee.

Philip A. Condra, District Public Defender, Jasper, Tennessee, for the appellees, Gary Kouns, et. al.

OPINION

Factual Background

The trial court summed up the facts adduced at a hearing as follows:

> [I]nvestigators for the Marion County Sheriff's Department obtained the immediate methamphetamine precursor sales records from several Marion County pharmacies. From these records of several thousand sales, the investigators compiled a list of all purchasers who had purchased methamphetamine precursors, primarily pseudoephedrine as contained in Sudafed, in cumulative amounts exceeding nine (9) grams in any thirty-day period. [FN 1 The thirty (30) day period is an arbitrary period established by the investigators.] No individual purchase exceeded sixty (60) tablets of Sudafed. [FN 2 Sixty (60) tablets [three (3) packages] of Sudafed contain a total of seven and two-tenths (7.2) grams of pseudophedrine.] From this list the investigators compiled a subset of persons with methamphetamine criminal records. Addtionally, investigators reviewed the first list with other agencies to see if the names they had pulled were known or suspected by other agencies as having been "involved" with methamphetamine production. At the conclusion of their investigation, original indictments were sought and obtained.

On April 3, 2006, the Marion County Grand Jury indicted twenty-nine individuals, who were identified as a result of the above investigation, with violating Tennessee Code Annotated section 39-17-433, promotion of methamphetamine manufacture. The public defender's office was appointed to represent sixteen of the individuals, including Gary Kouns, and the others were represented by private attorneys. On June 1, 2006, Defendant Kouns filed a motion to dismiss the indictment in which he argued that Tennessee Code Annotated section 39-17-433 was unconstitutional. The motion asserted that the statute was vague and overbroad. The remaining defendants filed similar motions to dismiss their indictments based on the unconstitutionality of the statute. On July 10, 2006, Defendant Kouns filed an amendment to his motion in which he argued that Tennessee Code Annotated section 39-17-433 was unconstitutional in its application. He argued that Public Chapter 18 of the acts of 2005, the enacting legislation of Tennessee Code Annotated section 39-17-433, was broader than its caption in violation of Article II, section 17 of the Tennessee Constitution, and law enforcement was engaged in selective and arbitrary prosecution in violation of the Fourteenth Amendment and Article I, section 8 and Article XI, section 8 of the Tennessee Constitution.

On July 20, 2006, the trial court conducted an evidentiary hearing on the motions to dismiss the indictments. On the same date, the trial court filed an order denying Defendant Kouns's motion to dismiss. The trial court specifically found that Tennessee Code Annotated section 39-17-433 was

"not unconstitutionally overbroad or vague on its face," the statute "does not give law enforcement officers too much discretion regarding whom to arrest for a suspected violation," and the statute was not unconstitutional based upon the fact that it contains two possible mental elements.

On August 3, 2006, the trial court filed a memorandum opinion and order. In this order, the trial court dismissed the indictments under Tennessee Code Annotated section 39-17-433 of all twenty-nine defendants. Tennessee Code Annotated section 39-17-433 states:

> (a) It is an offense for a person to promote methamphetamine manufacture. A person promotes methamphetamine manufacture who:
>
> (1) Sells, purchases, acquires, or delivers any chemical, drug, ingredient, or apparatus that can be used to produce methamphetamine, knowing that it will be used to produce methamphetamine, or with reckless disregard of its intended use;
>
> (2) Purchases or possesses more than nine (9) grams of an immediate methamphetamine precursor with the intent to manufacture methamphetamine or deliver the precursor to another person whom they know intends to manufacture methamphetamine, or with reckless disregard of the person's intent; or

The defendants were indicted under Tennessee Code Annotated section 39-17-433(a)(1). In its order, the trial court concluded that Tennessee Code Annotated section 39-17-433(a)(1) could not be used to prosecute an individual for the purchase of an immediate methamphetamine precursor because subsection (a)(2) would then have no purpose or meaning. The trial court based this conclusion upon the fact that Tennessee Code Annotated section 39-17-433(a)(2) specifically makes it a crime to purchase or possess an immediate methamphetamine precursor. Pseudoephedrine as contained in Sudafed is an immediate methamphetamine precursor. *See* T.C.A. § 39-17-402(13). However, Tennessee Code Annotated section 39-17-433(a)(2) also requires that the defendant purchase or possess more than nine grams. None of the defendants in the indictments possessed more than nine grams. Therefore, the trial court concluded that the State could not proceed under Tennessee Code Annotated section 39-17-433(a)(1) because that section did not control incidents involving immediate methamphetamine precursors, and the State could not proceed under Tennessee Code Annotated section 39-17-433(a)(2) because none of the defendants had purchased more than nine grams of pseudoephedrine. Therefore, the trial court dismissed the indictments and denied the State the opportunity to amend the indictments.

The State filed timely notices of appeal for each defendant. On appeal, the State argues three issues: (1) whether the trial court erred by conducting a post-indictment, pretrial examination of the State's evidence; (2) whether the trial court erred by concluding that, as a matter of law, the State may not indict a defendant for purchase or possession of an immediate methamphetamine precursor, such as pseudoephedrine, under the more general language of Tennessee Code Annotated section

39-17-433(a)(1); and (3) whether the trial court erred by concluding that the State may not prosecute a defendant for purchasing or possessing more than nine grams of an immediate methamphetamine precursor unless the nine grams was purchased or possessed at one time, despite the fact that the statute contains no such time requirement.

ANALYSIS

Constitutionality of Tennessee Code Annotated Section 39-17-433

Before we address the State's issues on appeal, we must address an issue raised by the sixteen Appellees represented by the Public Defender's Office. In their brief, they argue that the trial court erred in overruling their motions to dismiss the indictment based on their assertion that Tennessee Code Annotated section 39-17-433 is unconstitutional under both the Tennessee and United States Constitutions.

A. Violation of Article II, Section 17 of the Tennessee Constitution

Appellees argue that the public act which was codified as Tennessee Code Annotated section 39-17-433 was broader than its caption and, therefore, violates Article II, section 17 of the Tennessee Constitution. The caption of Public Chapter 18 for the Acts of 2005 reads, "AN ACT to amend Tennessee Code Annotated Titles 29 and 68 relative to methamphetamine." Appellees point out that Section 4 of Public Chapter 18 amends Tennessee Code Annotated section 38-1-101(a), which is included in Title 38. Appellees specifically argue that this section was not referenced in the caption, therefore, Tennessee Code Annotated section 39-17-433 is unconstitutional because Chapter 18 of the Acts of 2005 was broader than its caption.

"No bill shall become law which embraces more than one subject, that subject to be expressed in the title." Tenn. Const. art. II, § 17. "The purpose of this constitutional provision is to prevent "'omnibus bills' and bills containing hidden provisions of which legislators and other interested persons might not have appropriate or fair notice." *State v. Wyrick*, 62 S.W.3d 751, 790 (Tenn. Crim. App. 2001) (quoting *State ex rel. Blanton v. Durham*, 526 S.W.2d 109, 111 (Tenn. 1975)).

However, "the law is well established that codification of a legislative enactment cures all defects in the caption of the bill." *State v. Jones*, 889 S.W.2d 225, 228 (Tenn. Crim. App. 1994) (citing *Harmon v. Angus R. Jessup Assocs., Inc.*, 619 S.W.2d 522, 523 (Tenn. 1981)). "The defects are cured from the effective date of the Codification Act forward." *Jones*, 889 S.W.2d at 228 (citing *Keaton v. State*, 372 S.W.2d 163, 164 (Tenn. 1963)).

The caption states, "AN ACT to amend Tennessee Code Annotated, Titles 39 and 68, relative to methamphetamine." 2005 Tenn. Pub. Acts, ch. 18. Clearly the caption does not include a reference to Title 38, which is the amendment to which Appellee objects. Therefore, the amendment

to Tennessee Code Annotated section 38-1-101 does mean that the bill is broader than its caption. However, this conclusion does not end our inquiry.

The legislation which is the origin of the statute in question was approved by the governor on March 30, 2005. 2005 Tenn. Pub. Acts, ch. 18. This same legislation was codified by the Codification Act approved on March 7, 2006. 2006 Tenn. Pub. Acts, ch. 507. However, if the crime was committed before the act was codified, a defendant may bring a valid caption clause challenge. *State v. Chavis*, 617 S.W.2d 903, 905 (Tenn. Crim. App. 1980). The majority of the indictments allege that Appellees committed the crime before March 7, 2006. Therefore, most Appellees can bring a caption clause challenge.

Nonetheless, this Court does not have to conclude that Tennessee Code Annotated section 39-17-433 is unconstitutional in its entirety. The doctrine of elision allows a court to strike unconstitutional portions of a statute and find that the remaining provisions are indeed constitutional. *See Lowe's Cos., Inc. v. Cardwell*, 813 S.W.2d 428, 430-31 (Tenn. 1991). Our supreme court has stated:

> The doctrine of elision is not favored. *Smith v. City of Pigeon Forge*, Tenn., 600 S.W.2d 231 (1980). The rule of elision applies "if it is made to appear from the face of the statute that the legislature would have enacted it with the objectionable features omitted, and those portions of the statute which are not objectionable will be held valid and enforceable, . . . provided, of course, there is left enough of the act for a complete law capable of enforcement and fairly answering the object of its passage." *Davidson County v. Elrod*, 191 Tenn. 109, 232 S.W.2d 1 (1950). "However a conclusion by the court that the legislature would have enacted the act in question with the objectionable features omitted ought not to be reached unless such conclusion is made fairly clear of doubt from the face of the statute. Otherwise, its decree may be judicial legislation." *Davidson County v. Elrod*, *supra*.
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> The inclusion of a severability clause in the statute has been held by this Court to evidence an intent on the part of the legislature to have the valid parts of the statute in force if some other portion of the statute has been declared unconstitutional. *Catlett v. State*, 207 Tenn. 1, 336 S.W.2d 8 (1960).

Gibson County Special Sch. Dist. v. Palmer, 691 S.W.2d 544, 551 (Tenn. 1985); *see also State v. Tester*, 879 S.W.2d 823, 830 (Tenn. 1994); *Lowe's*, 813 S.W.2d at 430-31.

The legislature did include a severability clause in Chapter 18 of the Acts of 2005, and this caption clearly refers to Title 39 of the code, therefore, we can conclude that the legislature would

have enacted the legislation without the amendment to Tennessee Code Annotated section 38-1-101. *See* 2005 Tenn. Pub. Acts ch. 18, § 16.

We conclude that the remaining provisions, including Tennessee Code Annotated section 39-17-433, of Chapter 18 of the Acts of 2005 are constitutional under Article II, Section 17 of the Tennessee Constitution.

B. Violation of Fourteenth Amendment and Article I, Section 8 of the United States Constitution

Appellees have challenged the constitutionality of the statute in question, thus the general principles of statutory construction apply. Appellate courts are charged with upholding the constitutionality of statutes wherever possible. *State v. Lyons*, 802 S.W.2d 590, 592 (Tenn. 1990). In other words, we are required to indulge every presumption and resolve every doubt in favor of the constitutionality of the statute when reviewing a statute for a possible constitutional infirmity. *Lyons*, 802 S.W.2d at 592; *see also Petition of Burson*, 909 S.W.2d 768, 775 (Tenn. 1995). Generally, the language of a penal statute must be clear and concise to give adequate warning so that individuals might avoid the prohibited conduct. *See State v. Boyd*, 925 S.W.2d 237, 242-43 (Tenn. Crim. App. 1995). Nevertheless, the Tennessee Supreme Court has noted that "absolute precision in drafting prohibitory legislation is not required since prosecution could then easily be evaded by schemes and devices." *State v. Wilkins*, 655 S.W.2d 914, 916 (Tenn. 1983); *see also State v. Burkhart*, 58 S.W.3d 694, 697 (Tenn. 2001); *State v. McDonald*, 534 S.W.2d 650, 651 (Tenn. 1976).

Appellees originally raised this issue in the trial court. The trial court held an evidentiary hearing concerning Appellees constitutional issues with regard to Tennessee Code Annotated section 37-17-433. On July 29, 2006, the trial court filed a written order which states the following findings:

> 1. Tennessee Code Annotated section 39-17-433(a)(1) is not unconstitutionally overbroad or vague on its face. The statute clearly defines the prohibited conduct and the consequences of a violation.
> 2. The statute, on its face, does not give law enforcement officers too much discretion regarding whom to arrest for a suspected violation. Before an arrest may properly be made, police officers must possess probable cause that a suspect not only sold, possessed, acquired, or delivered a chemical drug, ingredient, or apparatus that can be used to produce methamphetamine, but that the suspect did so with knowledge that the item will be used to produce methamphetamine or with reckless disregard to its intended use.
> 3. The statute is not facially unconstitutional because it contains two possible mental elements, knowing and with reckless disregard. There is no danger of a jury's verdict not being unanimous based on the statute containing two mental elements because a person who acts knowingly also acts recklessly. *See* Tenn. Code Ann. § 39-11-302(a)(2).

1. Vague

A statute is void for vagueness if it is not "sufficiently precise to put an individual on notice of prohibited activities." *State v. Thomas*, 635 S.W.2d 114, 116 (Tenn. 1982); *see also Wilkins*, 655 S.W.2d at 915. A criminal statute "shall be construed according to the fair import of [its] terms" in determining if it is vague. T.C.A. § 39-11-104. "Due process requires that a statute provide 'fair warning' and prohibits holding an individual criminally liable for conduct that a person of common intelligence would not have reasonably understood to be proscribed." *Burkhart*, 58 S.W.3d at 697 (citing *Grayned v. City of Rockford*, 408 U.S. 104 (1972)).

To determine whether a statute is unconstitutionally vague, a court should consider whether the statute's prohibitions are not clearly defined and are thus susceptible to different interpretations regarding that which the statute actually proscribes. *State v. Whitehead*, 43 S.W.3d 921, 928 (Tenn. Crim. App. 2000). Therefore, a statute is not unconstitutionally vague "'which by orderly processes of litigation can be rendered sufficiently definite and certain for purposes of judicial decision.'" *Wilkins*, 655 S.W.2d at 916 (quoting *Donathan v. McMinn County*, 213 S.W.2d 173, 176 (Tenn. 1948)).

Appellees argue that the language of Tennessee Code Annotated section 39-17-433(a)(1), under which they were indicted, violates their due process rights because it does not put an individual on notice of the prohibited activities. That particular subsection reads: "A person promotes methamphetamine manufacture who . . . Sells, purchases, acquires, or delivers any chemical, drug, ingredient, or apparatus that can be used to produce methamphetamine, knowing that it will be used to produce methamphetamine, or with reckless disregard of its intended use . . . ." We conclude that this subsection clearly defines the prohibitions and is not susceptible to differing interpretations. As applied to the Appellees, the subsection basically prohibits the purchase of any chemical, drug, ingredient or apparatus used to make methamphetamine when the individual knows that the purchased item's intended use is to make methamphetamine or with reckless disregard that the purchased item might be used to make methamphetamine.

The statute clearly states that an individual should not purchase any item that could fall within the list of categories with the knowledge that it will be used to produce methamphetamine. Appellees purchased pseudoephedrine. Pseudoephedrine is a well-known ingredient used to make methamphetamine. The purchase of this item is clearly prohibited if Appellees knew it was going to be used to make methamphetamine or knew that it was possible the psuedoephedrine was going to be used to make methamphetamine. The statute is not void for vagueness because it gave fair warning to Appellees and others that a purchase of items to make methamphetamine is prohibited.

A statute may also be considered vague if it encourages arbitrary and discriminatory enforcement. *See City of Chicago v. Morales*, 527 U.S. 41, 56 (1999). Such a statute would be a violation of due process. *Id.* Appellees argue that Tennessee Code Annotated section 39-17-433(a)(2) is vague based upon arbitrary and discriminatory enforcement.

In *Burkhart*, our supreme court stated the following with regard to arbitrary and discriminatory application:

> Facial vagueness challenges, however, that implicate no constitutionally protected conduct should be sustained only if the statute is impermissibly vague in all its applications. *See [Village of] Hoffman Estates [v. Flipside, Hoffman Estates, Inc.]*, 455 U.S. at 494-95, 102 S.Ct. 1186. A party who engages in conduct that is clearly proscribed by the statute cannot complain of the vagueness of the law as applied to others. *See id.* at 495, 102 S.Ct. 1186; *see also Parker v. Levy*, 417 U.S. 733, 756, 94 S.Ct. 2547, 41 L. Ed. 2d 439 (1974) (holding that "[o]ne to whose conduct a statute clearly applies may not successfully challenge it for vagueness."). Courts should therefore examine the conduct of the moving party before analyzing hypothetical applications of the law. *See id.* In the absence of a facial infirmity, the Court will not consider "in advance of application all possible contingencies of attempted prosecution under a criminal statute, and declare which are constitutional and which are not." *State v. King*, 635 S.W.2d 113, 114 (Tenn. 1982). The rationale for this requirement is that "to sustain such a challenge, the complainant must prove that the enactment is vague 'not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all.'" *Hoffman Estates*, 455 U.S. at 495, n.7, 102 S.Ct. 1186 (quoting *Coates v. City of Cincinnati*, 402 U.S. 611, 614, 91 S.Ct. 1686, 29 L.Ed.2d 214 (1971)).

Burkhart, 58 S.W.3d at 699.

Appellees rely on the officer's testimony at the hearing on this issue in which he stated that he and other officers collected the log sheets from pharmacies where individuals had purchased pseudoephedrine and added the amounts together to exceed 9 grams. Appellees point to the fact the trial court determined that law enforcement could not aggregate these amounts to meet the 9 grams of pseudoephedrine required for an offense under Tennessee Code Annotated section 39-17-433(a)(2).

However, Appellees were not indicted under Tennessee Code Annotated section 39-17-433(a)(2). Therefore, the officers aggregation of the amount of pseudoephedrine purchased by them is of no consequence. The fact that law enforcement officers aggregated the amount does not lead to the conclusion that subsection (a)(2) is unconstitutionally vague with regard to Appellees. Appellees attempt to attack Tennessee Code Annotated section 39-17-433(a)(2) is tantamount to complaining of the vagueness of the statute as applied to others as described in *Burkhart*. We will not analyze a hypothetical situation that could fall under this subsection but does not apply to Appellees. The complained of statute has not actually been applied to Appellees because it is not the crime for which they were indicted. Therefore, as stated in *Burkhart*, we decline to determine

the constitutionality of the statute when there has been no attempted prosecution of the Appellees under the complained of statute.

2. Overbreadth

Appellees also argue that Tennessee Code Annotated section 39-17-433(a)(1) is overbroad and violates the First and Fourteenth Amendments to the United States Constitution and Article I, Section 8 of the Tennessee Constitution. Specifically, Appellees argue that the statute's prohibition of the purchase of psuedoephedrine when an individual knows that it will be used to manufacture methamphetamine or with reckless disregard of the intended use of the psuedoephedrine, impacts an individual's right of association and privacy interests.

"'Overbreadth' is a judicially created doctrine designed to prevent the chilling of protected expression. The doctrine of overbreadth derives from the recognition that an unconstitutional restriction of expression may deter protected speech by parties not before the court and thereby escape judicial review." 16A Am. Jur. 2d Constitutional Law § 411 (2003). A statute may be challenged as overbroad when it reaches a substantial amount of constitutionally protected conduct. *Hoffman Estates*, 455 U.S. 489, 494 (1982); *Burkhart*, 58 S.W.3d at 679. A statute may be invalid on its face if it inhibits the exercise of First Amendment rights and "if the impermissible applications of the law are substantial when 'judged in relation to the statute's plainly legitimate sweep.'" *Burkhart*, 58 S.W.3d at 679. To maintain an overbreadth challenge, Appellees must first show that the statute challenged involves constitutionally protected conduct. *Id.* If the statute reaches a substantial amount of constitutionally protected conduct, a defendant must then "demonstrate from the text of the law and actual fact that there are a substantial number of instances where the law cannot be applied constitutionally." *Id.* (quoting *Lyons*, 802 S.W.2d at 593). Further, the United States Supreme Court has "cautioned that the doctrine of overbreadth is 'strong medicine' to be used 'sparingly and only as a last resort.'" *State v. Lakatos*, 900 S.W.2d 699, 701 (Tenn. Crim. App. 1994) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973)).

Appellees argue that the statute violates an individual's right to associate with whomever she or he chooses. In *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), the United States Supreme Court has recognized "freedom of association" in two distinct lines of cases. *Roberts*, 468 U.S. at 617. In one line of decisions, what the Court has referred to as "intimate association," refers to the "choices to enter into and maintain certain intimate human relationships . . . ." *Id.* at 618. The other line of decisions, what the Court has referred to as "freedom of expressive association," recognizes "a right to associate for the purpose of engaging in those activities protected by the First Amendment – speech, assembly, petition for the redress of grievances, and the exercise of religion." *Id.* The Court went on to discuss what constituted intimate association. The Court stated:

> Family relationships, by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively

> personal aspects of one's life. Among other things, therefore, they are distinguished by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship. As a general matter, only relationships with these sorts of qualities are likely to reflect the considerations that have led to an understanding of freedom of association as an intrinsic element of personal liberty. Conversely, an association lacking these qualities - such as a large business enterprise - seems remote from the concerns giving rise to this constitutional protection. Accordingly, the Constitution undoubtedly imposes constraints on the State's power to control the selection of one's spouse that would not apply to regulations affecting the choice of one's fellow employees. *Compare Loving v. Virginia*, 388 U.S. 1, 12, 87 S.Ct. 1817, 1823, 18 L. Ed. 2d 1010 (1967), *with Railway Mail Assn. v. Corsi*, 326 U.S. 88, 93-94, 65 S.Ct. 1483, 1487, 89 L. Ed. 2072 (1945).
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> Between these poles, of course, lies a broad range of human relationships that may make greater or lesser claims to constitutional protection from particular incursions by the State. Determining the limits of state authority over an individual's freedom to enter into a particular association therefore unavoidably entails a careful assessment of where that relationship's objective characteristics locate it on a spectrum from the most intimate to the most attenuated of personal attachments. *See generally Runyon v. McCrary*, 427 U.S. 160, 187-189, 96 S.Ct. 2586, 2602-2603, 49 L. Ed. 2d 415 (1976) (POWELL, J., concurring).

Id. at 619-20.

Appellee argues that an individual's privacy rights afforded under the Tennessee Constitution are sometimes broader than those allowed under the United States Constitution. Appellees are correct in this assertion. *See Davis v. Davis*, 842 S.W.2d 588, 599-600 (Tenn. 1992); *Campbell v. Sundquist*, 926 S.W.2d 250, 261 (Tenn. Ct. App. 1996). This Court has analyzed an individual's right to privacy under the Tennessee Constitution. In *State v. Vaughn*, 29 S.W.3d 33 (Tenn. Crim. App. 1998), *perm. app. denied* (Tenn. 1999), the defendants had been given citations for failing to wear their helmets while riding their motorcycles in a funeral procession. 29 S.W.3d at 36. The defendants appealed arguing that the helmet law violated their right to privacy and right to free speech. *Id.* This Court examined the right to privacy under the Tennessee Constitution and came to much the same conclusion as the United States Supreme Court when it stated, "the evolution of privacy law transpired out of 'the need to protect individuals from unwarranted governmental intrusion into matters . . . involving *intimate questions of personal and family concern*.'" *Id.* at 37 (quoting Davis, 842 S.W.2d at 600) (emphasis added in *Vaughn*). This Court went on to conclude that refusing to wear protective headgear while operating a motor vehicle "is in no way analogous to decisions involving parenting, procreation or consensual, noncommercial sexual activity." The same can be said of a meeting between two individuals during which one gives the other

pseudoephedrine with which the second individual intends to manufacture an illegal substance. Therefore, we cannot conclude that the enforcement of the statute would fall within protected conduct as intimate association under the United States Constitution or a right to privacy as conditioned under the Tennessee Constitution. Therefore, Appellee has failed to prove that the challenge involves constitutionally protected conduct as required for an overbreadth challenge.

Even if the conduct referenced in the statute was to be considered constitutionally protected, the statute would still stand. It has been stated that freedoms usually protected under both the United States and Tennessee Constitutions can be curtailed when it is in the interest of the State. The Supreme Court has stated that "freedom could be overridden 'by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.'" *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000) (quoting *Roberts*, 468 U.S. at 623). In *Vaughn*, this Court stated that the helmet statute was not unconstitutional because, "protecting the safety of its citizens is within the state's police power, . . . [when] rationally related to that state interest."

When looking at the statute in question, we conclude that the prevention of the purchase or delivery of any "chemical, drug, ingredient, or apparatus" which is intended to be used for the manufacture of methamphetamine is well within the State's police power to protect the safety of its citizens. Appellees argue that this statute is not necessary because there is a plethora of drug enforcement statutes in the State. However, the dangers inherent in both the manufacture and subsequent use of methamphetamines is well-documented. Therefore, the State has a legitimate interest in targeting methamphetamine manufacture as well as use.

Therefore, we find this issue to be without merit.

3. Equal Protection

Appellee argues that Tennessee Code Annotated section 39-17-433 violates the Equal Protection clause because the State did not prosecute all individuals included on the pharmaceutical logs who purchased similar amounts of pseudoephedrine. He argues that all persons who were similarly situated were not treated equally. Equal protection is guaranteed by both the United States and Tennessee Constitutions.[1] Although "[t]he equal protection provisions of the Tennessee Constitution and the Fourteenth Amendment are historically and linguistically distinct," the Tennessee Supreme Court has stated that Article I, section 8 and Article XI, section 8 of the Tennessee Constitution confer "essentially the same protection" as the equal protection clause of the United States Constitution. *State v. Tester*, 879 S.W.2d 823, 827-28 (Tenn. 1994) (citing *Tennessee Small Sch. Sys. v. McWherter*, 851 S.W.2d 139, 152 (Tenn. 1993)). Under both the state and federal

[1] Section 1 of the Fourteenth Amendment to the United States Constitution provides: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

constitutions, a statute does not unconstitutionally create an unreasonable classification unless it applies to some groups and excludes others. *State v. Teasley*, 653 S.W.2d 761, 762 (Tenn. Crim. App. 1983).

Selective enforcement of a statute can also violate equal protection principles. However, such a violation occurs only when the selection is "deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification." *Oyler v. Boles*, 368 U.S. 448, 456 (1962). Absent such an arbitrary classification, state officials enjoy broad prosecutorial discretion. *Cooper v. State*, 847 S.W.2d 521, 536 (Tenn. Crim. App. 1992). A defendant who claims selective enforcement "must establish that the law enforcement decision had a discriminatory purpose and produced a discriminatory effect." *State v. Harton*, 108 S.W.3d 253, 261 (Tenn. Crim. App. 2002), *perm. app. denied* (Tenn. 2002) (quoting *United States v. Armstrong*, 517 U.S. 456, 465 (1996)). A successful selective enforcement claim consists of two elements: (1) the government has singled out the claimant for enforcement action while others engaging in similar activity have not been subject to the same action; and (2) the decision to prosecute rests on an impermissible consideration or purpose. *Id.* (citing *412 Corp. v. Metropolitan Gov't*, 36 S.W.3d 469, 480 (Tenn. Ct. App. 2000)). To meet the first element, the defendant must prove "that other non-prosecuted offenders engaged in similar conduct; those offenders violated the same law the claimant is accused of violating; and the magnitude of their violation was not materially different from that of the claimant." *Id.* To meet the second element, the defendant must prove that "the government singled out a protected class of citizens for enforcement, or the prosecution was intended to deter or punish the exercise of a protected right." *Id.*

Appellee's argument is essentially one of selective enforcement of the statute rather than that Tennessee Code Annotated section 39-17-433 violates equal protection rights on its face. Appellee states that the officers arrested people from the pharmaceutical logs whose names they recognized and others who had a criminal history and selected individuals for prosecution who had a reputation for buying drugs or associating with people who actually bought drugs. Appellees argue that the non-prosecuted individuals on the pharmaceutical logs engaged in a similar activity.

Appellees claims fail for several reasons. First, Appellees cannot meet both elements to prove a selective enforcement claim. As stated above, Appellees must prove that the other individuals engaged in similar conduct and violated the same law that the prosecuted individuals did. While it is true that the non-prosecuted individuals did indeed purchase pseudoephedrine in similar amounts, the purchase of pseudoephedrine in itself is not the objective of the statute in question. We point out that the law does not criminalize the purchase of pseudoephedrine, but instead criminalizes the purchase of pseudoephedrine with intent for eventual use in the manufacture of methamphetamine. Appellees presented no proof at the evidentiary hearing that there were other individuals on the pharmaceutical logs who were purchasing pseudoephedrine with the intent to manufacture methamphetamine. Therefore, they have not shown that the non-prosecuted individuals were engaged in a similar activity.

More important to the analysis is the second element. As stated above, Appellees must prove that the officers singled out a protected class of citizens. Appellees argue that they were discriminated against because of prior criminal convictions. Where a statute is neutral on its face, but has been found to violate equal protection rights of individuals, the cases have involved "discrimination against suspect or quasi-suspect classes, like race, age, or gender." *Nat'l Gas Distrib. v. Sevier County Utility Dist.*, 7 S.W.3d 41, 46 (Tenn. Ct. App. 1999), *perm. app. denied* (Tenn. 1999). We have found no case in which individuals who have committed crimes in the past are a protected class for equal protection purposes. *See U.S. v. Hook*, 471 F.3d 766, 774 (7th Cir. 2006) (stating "Felons are not a protected class . . . ."). Appellees have presented no argument to support a reasonable conclusion that they are part of a suspect class such as is entitled to the high level of protection afforded under the Equal Protection Clause.

For these reasons, Appellees have proven neither element of their selective enforcement claim.

We now turn to the State's arguments that the trial court erred in holding a post-indictment, pre-trial evidentiary hearing and in dismissing the indictments.

Evidentiary Hearing on the Motion to Dismiss

The trial court held an evidentiary hearing on the Appellees' Motions to Dismiss their indictments. During this hearing, two law enforcement officers testified as to the procedures used to determine whom to investigate and eventually charge under the statute in question. A pharmacist also testified at the hearing about pharmacy procedures in keeping a log concerning the purchase of psuedoephedrine. The trial court filed a Memorandum Opinion and Order which included the following findings:

> This Court has previously ruled that T.C.A. § 39-17-433(a)(1) is not over broad [sic] or vague on its face. However, since there have been no preliminary hearings and because the Court was concerned as to proper application of this Act under the facts in these cases, the Court has conducted an evidentiary hearing so that it may consider both issues of constitutionality and statutory construction. While the Court has found no constitutional invalidity, the Court is further required to interpret the subject statute for guidance of law enforcement as to the applicability of the law under the facts as now established in these cases. In this regard it is a basic rule of statutory construction that a criminal statute must be strictly construed against the State.
>
> > Under the rule of strict construction, such statutes will not be enlarged by implication or intendment beyond the fair meaning of the language used, and will not be held to include other offenses and persons than those which are clearly described and provided for,

> although the court may think the legislature should have made them more comprehensive.
>
> *State v. Hale*,
> 840 S.W.2d 307 at 312 (Tenn. 1992)

It is further the duty of the Court to reconcile different provisions of a statute so as to give a consistent meaning. When there are conflicts and ambiguities between two subsections of a statute, the provision last mentioned will prevail. *Bible & Godwin Construction Co. v. Faener Corp.*, 504 S.w.2d 370 (Tenn. 1974). And more importantly, a specific provision of a statute controls a general provision which would otherwise include that mentioned in the specific provision. *State v. Lowe*, 661 S.W.2d 701 at 703 (Tenn. Crim. App. 1983).

. . . .

With regard to the language of subsection (a)(2), the term "immediate methamphetamine precursor" is defined in the Act with specificity as follows:

> (13) "Immediate methamphetamine precursor" means ephedrine, pseudoephedrine or phenylpropanolamine, or their salts, isomers or salts of isomers, or any drug or other product that contains a detectable quantity of ephedrine, pseudoephedrine or phenylpropanolamine, or their salts, isomers or salts of isomers.
>
> T.C.A. § 39-17-402(13)

Following the mandates of statutory construction mentioned herein, it is clear that T.C.A. § 39-17-433(a)(2) is the controlling language for a case based on the purchase or possession of an immediate methamphetamine precursor. To allow subsection (a)(1) to be used for immediate methamphetamine precursors would cause subsection (a)(2) to have no purpose or meaning. This is a violation of the rule of statutory construction which requires the Court to give meaning to all sections of a statute where possible. The Court is further required to apply subsection (a)(2) since specific language controls over general language and later language controls over earlier language. *State v. Lowe*, supra at 703, and *Bible & Godwin Const. Co. Inc. v. Faener Corp.*, supra at 372.

CONCLUSION

This Court has an obligation to apply the law as written and to sustain the constitutionality of a statute where possible. In the cases at hand it is clear T.C.A. § 39-17-433(a)(2) and not T.C.A. § 39-17-433(a)(1) is the applicable and controlling

> provision of the Meth-Free Tennessee Act applicable to immediate methamphetamine precursor cases. In order to make out a case under T.C.A. § 39-17-433(a)(2), the State must produce evidence of a purchase or possession of more than nine (9) grams of an immediate methamphetamine precursor. The Court has previously indicated that if asked it would allow the State to amend its indictments to charge under the precursor provisions of T.C.A. § 39-17-433(a)(2). However, on further review of the evidence and the law, it is clear that since none of the purchases in these cases exceeds nine (9) grams, the State simply cannot legally make a promotion case as to any of these Defendants even if the indictments were amended. T.C.A. § 39-17-433(a)(2) in order to withstand a challenge for vagueness must be applied on a single purchase or possession basis. If the Court were to permit the State to aggregate purchases over an indefinite period of days and locations in order to meet the more than nine (9) gram minimum, this section would become unconstitutionally vague. The clear meaning of subsection (a)(2) as applied to these cases requires evidence of a purchase by a defendant which exceeds nine (9) grams of an immediate methamphetamine precursor. Since no such proof exists, the indictments, even if amended, must fail.

The trial court concluded by dismissing the indictments under Tennessee Code Annotated section 39-17-433(a)(1).

Statutory Interpretation

We first address the State's challenge to the trial court's statutory construction of Tennessee Code Annotated section 39-17-433(a)(1). Generally, when construing a statute, every word within the statute is presumed to "have meaning and purpose and should be given full effect." *State v. Odom*, 928 S.W.2d 18, 29-30 (Tenn. 1996) (quoting *Marsh v. Henderson*, 424 S.W.2d 193, 196 (Tenn. 1968)). This Court's primary duty in construing a statute is "to ascertain and give effect to the legislative intent without unduly restricting or expanding a statute's coverage beyond its intended scope." *Owens v. State*, 908 S.W.2d 923, 926 (Tenn. 1995); *see also State v. Davis*, 940 S.W.2d 558, 561 (Tenn. 1997). Legislative intent should be gleaned from the "natural and ordinary meaning of the language used, without a forced or subtle construction that would limit or extend the meaning of the language." *Carter v. State*, 952 S.W.2d 417, 419 (Tenn. 1997). "In seeking to determine the 'natural and ordinary meaning' of statutory language, the usual and accepted source for such information is a dictionary." *English Mountain Spring Water v. Chumley*, 196 S.W.3d 144, 148 (Tenn. Ct. App. 2005). Furthermore, this Court should construe a statute so that its component parts are consistent and reasonable, and inconsistent parts should be harmonized, where possible. *Odom*, 928 S.W.2d at 30.

Tennessee Code Annotated section 39-17-433(a) states:

> (a) It is an offense for a person to promote methamphetamine manufacture. A person promotes methamphetamine manufacture who:
>
> (1) Sells, purchases, acquires, or delivers any chemical, drug, ingredient, or apparatus that can be used to produce methamphetamine, knowing that it will be used to produce methamphetamine, or with reckless disregard of its intended use;
>
> (2) Purchases or possesses more than nine (9) grams of an immediate methamphetamine precursor with the intent to manufacture methamphetamine or deliver the precursor to another person whom they know intends to manufacture methamphetamine, or with reckless disregard of the person's intent; or
>
> (3) Permits a person to use any structure or real property that the defendant owns or has control of, knowing that the person intends to use the structure to manufacture methamphetamine, or with reckless disregard of the person's intent.

As stated above, the trial court concluded that the use of (a)(1) to prosecute for purchase of an immediate methamphetamine precursor would nullify (a)(2). We find that this conclusion is erroneous. First of all, there is no language in subsection (a)(1) that excludes an immediate methamphetamine precursor from the very inclusive list of "chemical, drug, ingredient, or apparatus that can be used to produce methamphetamine" which is contained in subsection(a)(1). It is obvious that an immediate methamphetamine precursor would be included in this list. Psuedoephedrine, as an immediate methamphetamine precursor, is definitely a chemical, drug, or ingredient used to produce methamphetamine. We also point out that subsection (a)(2) requires the purchase or possession of more than nine grams of an immediate precursor. This fact leads to the conclusion that subsection (a)(1) would apply to situations where the individual has purchased nine grams or less of immediate methamphetamine precursor, such as the cases at hand. We believe that the legislature did not intend to restrict punishment to individuals who purchase more than nine grams of immediate methamphetamine precursor and absolve those who purchase nine grams or less of immediate methamphetamine precursor with an intent to manufacture methamphetamine. Clearly, the legislature would want to provide for the punishment of individuals who purchased nine grams or less of immediate methamphetamine precursor when the intended use is to produce methamphetamine. Subsection (a)(1) clearly covers such a situation.

Also, subsection (a)(1) is more general in application than subsection (a)(2). This is evident from the natural language of the subsections. Subsection (a)(2) applies to an individual who purchases or possesses more than nine grams of immediate methamphetamine precursor. Subsection (a)(1) applies to an individual who "[s]ells, purchases, acquires, or delivers any chemical, drug, ingredient, or apparatus that can be used to produce methamphetamine." Because the two subsections appear to target different activities, we find that it would be unduly restricting to decide that subsection (a)(1) cannot apply to the purchase of less than nine grams of immediate

methamphetamine purchase solely because subsection (a)(2) applies specifically to the purchase of over nine grams of immediate methamphetamine precursor.

Therefore, having ascertained the natural meaning of the language contained in these two subsections and analyzing them in total, we conclude that the trial court erred in determining that subsection (a)(1) cannot apply to the purchase of nine grams or less of immediate methamphetamine precursor.

Pretrial Hearing

The State also argues that the trial court erred in holding a post-indictment, pretrial hearing during which the trial court "went on a fact-finding expedition that included hearing testimony from two law enforcement officers and a pharmacist." The Appellees argue that the trial court held the hearing to determine whether Tennessee Code Annotated section 37-19-433 and the State's application of the act had violated the Appellees' rights under either the United States or Tennessee Constitutions.

At the conclusion of the evidentiary hearing, the trial court dismissed the indictments brought under Tennessee Code Annotated section 39-17-433(a)(1). We now review the trial court's decision to dismiss the indictments herein. As stated above, the trial court dismissed the indictments based upon its determination that Tennessee Code Annotated section 39-17-433(a)(1) does not apply to the purchase of an immediate methamphetamine precursor due to the existence of Tennessee Code Annotated section 39-17-433(a)(2), which applies to the purchase of more than nine grams of immediate methamphetamine precursor. We have concluded above, that this determination by the trial court was in error. We therefore need not determine whether, under the circumstances of this case, holding an evidentiary hearing was error.

Therefore, the indictments must be reinstated.

Amendment of Indictments

As part of its decision that subsection (a)(1) did not apply to the purchase of immediate methamphetamine precursor, the trial court also determined that the State could not be allowed to amend the indictments to charge under subsection (a)(2) because the State could not prove that the defendants purchased more than nine grams of immediate methamphetamine precursor in one purchase. The State argues that the trial court erred in refusing to allow an amendment to the indictment. Because we have already determined that subsection (a)(1) can apply to the purchase of nine grams or less of immediate methamphetamine precursor and the indictments must be reinstated, this issue is moot.

CONCLUSION

For the foregoing reasons, we affirm the trial court's determination that the statute in question is constitutional, but we reverse the trial court's dismissal of the indictments charged under Tennessee Code Annotated section 39-17-433(a)(1). Therefore, we order the reinstatement of the indictments.

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JERRY L. SMITH, JUDGE